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In The

Supreme Court Of The United States

OCTOBER TERM, 1974

NO. 74-1417

THOMAS P. LALLY, PETITIONER,

V.

STATE OF CONNECTICUT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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PETITION FOR WRIT OF CERTIORARI TO THE

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Petitioner, Thomas P. Lally, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered on February 11, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at Vol. XXXVI C.L.J. No. 33 at Page 1 (February 11, 1975), a copy of which is attached to this petition as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was entered on February 11, 1975, affirming petitioner's conviction dated May 23, 1972. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting here deprivation of a right secured by the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment of the Constitution of the United States.

QUESTION PRESENTED

Witness William F. Best made an in-court identification of Petitioner. At a pre-trial identification the Witness was shown approximately five or six photographs by Detective Joseph Hammick. Witness Best identified a photograph of the Petitioner as the man who had been in his taxi the night of the homicide. Prior to said night, Witness Best had no knowledge of ever having seen or known of the Petitioner. From the time of the taxi ride to the time of the pre-trial identification, Petitioner had not come to know the name or identity of the Petitioner. Detective Hammick did not keep any record of the photographs which were shown. During the pre-trial identification Petitioner was a suspect and in the custody of the Police.

The threshold question is:

Does the Sixth Amendment right to the assistance of counsel require that photographs used in a pre-trial identification be preserved and made available for cross-examination during the trial.

STATEMENT OF THE CASE

During the evening of January 26, 1970, Ross Thomas was in his apartment located on the second floor of the premises known as 442 Farmington Avenue, Hartford. Joseph M. Tobin, Jr. was with him. On about January 27, 1970 a person named John Gill came to the apartment. Mr. Tobin stayed in the same room with Mr. Thomas and Mr. Gill for about fifteen minutes. Mr. Tobin then left the apartment.

About 3:30 A.M. on January 27th, George A. Kendall, Jr. was employed at a gas station

located on the corner of Park Street and Sisson Avenue in Hartford when a man walked into the station. After a conversation, the man went to the men's room. A short time later a yellow cab pulled into the gas station. The man came out of the men's room and got into said cab.

About 4:30 A.M. on January 27th, William F. Best was operating a Yellow Cab. He received a dispatch to pick up a fare at the corner of Park Street and Sisson Avenue. Mr. Best pulled his cab into the gas station. A man came out of the men's room and entered said cab sitting on the passenger's side of the front seat. Mr. Best drove the cab to Lou's Quartet Restaurant on Farmington Avenue in Hartford. The man got out of the cab there and paid his fare. Mr. Best had no prior knowledge of the identity of the man nor had he ever seen the man before.

About 5:40 A.M. on January 27th, Hartford Police officer Walker S. Parker entered Lou's Quartet Restaurant. He sat down and he saw a man he recognized. The man was in the restaurant for three or four minutes and then left. Officer Parker spoke to another man in the restaurant and then called the Hartford police station. Officer Parker recognized the man as Thomas Lally.

Officer Parker left the restaurant and went to 442 Farmington Avenue. He met another police officer there and they went to the second floor Thomas apartment. There they found the dead body of Ross Thomas. Officer Parker notified the police dispatcher and detectives arrived about four minutes later.

About 6:00 A.M. on January 27th, Irving S. Caplan was driving a Yellow Cab. He picked up a man as his first fare at Lou's Quartet Restaurant and took him to the Statler Hilton Hotel. When the cab arrived there, the man paid his fare and entered the hotel. Mr. Caplan recognized the man as Thomas Lally.

During the morning hours of January 27th,

Hartford police officer Henry M. Johnson was on foot patrol in Bushnell Park when he heard a radio dispatch. He went to the Statler Hilton Hotel and saw a Yellow Cab at the entrance. Officer Johnson entered the hotel and he saw a man standing at the register desk. Mr. Johnson made a frisk of the person of the man and he found a gun which he took into his possession.

Between 6:10 and 6:15 A.M. Hartford police sergeant Arthur Williams went to the Statler Hilton Hotel. He saw Officer Johnson frisk a man and take possession of a gun. Sergeant Williams placed that man under arrest and ordered Officer Johnson to take the man to the police station. Officer Johnson did so.

Sometime during the morning of January 27th the body of Ross Thomas was taken to Hartford Hospital. An autopsy was performed by Dr. Robert Tennant. Dr. Tennant removed two bullets from the head of Ross Thomas and he gave them to Walter Perkins, the director of the crime laboratory of the City of Hartford who was present at the autopsy.

Mr. Perkins returned to his office. Officer Johnson gave Mr. Perkins the gun which he had taken into his possession at the Statler Hilton Hotel.

During the morning of January 27th, and thereafter, detectives of the Hartford Police Department conducted an investigation at 442 Farmington Avenue. Detective Michael Amaruso found and lifted what appeared to be a latent fingerprint on an ashtray which was in the Thomas apartment.

During the morning and into the afternoon of January 27th, Mr. Tobin, Mr. Kendall, Mr. Best and Mr. Caplan were at the Hartford police station. Thomas Lally was at the police station under arrest.

Detective Ralph Murray showed Mr. Tobin various pictures and Mr. Tobin identified a picture of Thomas Lally as being the man named John Gill whom he had seen in the Thomas apartment. Detective Murray did not keep any record of the phtographs which were shown.

Detective John Rucci showed Mr. Kendall various pictures and Mr. Kendall identified a picture of Thomas Lally as being the man he had seen at the gas station. In all Mr. Kendall was shown six photographs.

Detective Joseph Hammick showed Mr. Best approximately five or six pictures and Mr. Best identified a picture of Thomas Lally as the man who had been in his taxi. Detective Hammick did not keep any record of the photographs which were shown.

Detective Francisco Niro showed Mr. Caplan six pictures and Mr. Caplan identified a picture of Thomas Lally as the man he had picked up at Lou's Quartet Restaurant. Mr. Niro recorded the number of the photos and put the photos in an envelope which was placed in a file.

Detective Amaruso worked in the identification bureau of the Hartford Police Department. He compared the fingerprint found in the apartment with a fingerprint of Thomas Lally. He formed an opinion that Thomas Lally had made the fingerprint found on the ashtray.

Mr. Perkins performed ballistics tests on the two bullets given to him by Dr. Tennant. He fired the gun which had been taken from the man at the Statler Hilton and he recovered the bullet. He compared the bullets given to him by Dr. Tennant with the bullet recovered by him. He formed the opinion that the two bullets given to him by Dr. Tennant had been fired from the gun taken from Thomas Lally by Officer Johnson at the Statler Hilton.

Thomas Lally was presented before a grand jury and a true bill of murder in the first degree was returned against him. He was held without bond. He was committed to Norwich Hospital for a time. From Norwich Hospital he was transferred to Security Treatment Center in Middletown.

While at Norwich Hospital, Dr. Ralph C. Andrews and Dr. Heruesto Soriano, both psychiatrists, had occasion to examine Thomas Lally. They formed the opinions that Thomas Lally on January 27, 1970, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Thomas Lally was tried for and convicted of murder in the second degree.

REASONS FOR GRANTING THE WRIT

Four witnesses made pre-trial photographic identifications of the Petitioner and subsequently testified at the trial. Witness Best was the only witness who had no prior contact with or knowledge of the Petitioner and in whose photographic display the photographs were not preserved for trial. The single issue to resolve therefore is whether Detective Hammick should have preserved the photographs shown to Witness Best at the pre-trial identification of Petitioner Lally in order to afford Petitioner the opportunity to cross-examine on the photographs during the trial of the case where Witness Best made an in-court identification of the Petitioner.

In U.S. v. Wade, 388 U.S. 218 (1967) it was said that the plain wording of the Sixth Amendment guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence'". It had already been decided in Powell v. State of Alabama, 287 U.S. 45 (1932) and cases following that decision that in order

to assure a meaningful defense counsel might be necessary at times prior to and other than the formal trial.

There can be no doubt that a pre-trial identification can be a critical stage of the prosecution. There can also be no doubt that a courtroom identification could result from a suspect pre-trial identification, which courtroom identification could easily be the basis of a conviction.

In U.S. v. Wade, supra, it was stated that "it appears that there is grave potential for prejudice, intentional or not, in the pre-trial lineup, which may not be capable of reconstruction at trial, and... presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial."

The requirement for counsel decided in U.S. v. Wade, supra, was limited to a pre-trial lineup. There is no similar requirement for counsel in a photographic pre-trial identification. "The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." Simmons v. United States, 390 U.S. 377 (1968). The court permitted the pre-trial photographic identification provided it was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The Court in United States v. Ash, 413 U.S. 300 (1973) specifically ruled that the presence of counsel at a photographic pre-trial identification was not required to satisfy the Sixth Amendment guarantee. Part of the rationale being that the accused is not present at a pre-trial photographic identification (as distinguished from a lineup) and therefore "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." This

distinction is meaningless in assessing the relative potentials for impermissible suggestiveness.

The more substantial rationale is that irretrievable prejudice in a photographic pretrial identification "is remote, since any unfairness that does occur can usually be flushed out at trial through cross-examination of the prosecution witnesses." This belief is based on counsel's ability to reconstruct the pre-trial photographic identification at the time of trial. "A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photographs may be markedly different from the others displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness' description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant's picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness - and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display." United States v. Ash, supra.

If the rationale of Ash is to have any applied meaning, the pre-trial photographic identification must be capable of accurate reconstruction. Such a reconstruction can only be achieved if the photographs are preserved for examination at the trial. There can be no accurate reconstruction from the witness alone. A suggestive photographic display can be so subtle

as to preclude the possibility of recollection or comment by the witness at the time of trial.

The requirement that photographs used in a pre-trial identification be preserved for examination at the trial would not impose an undue hardship on police interviews of witnesses. It is a rather simple procedure compared to having counsel present at every photographic display. Certainly it is a rather harmless way to offset the possibility of a most harmful misidentification.

CONCLUSION

Based on the facts hereinabove set forth, and the constitutional issue raised in this petition, Petitioner prays for the issuance of a writ of certiorari to issue from this Court to the Supreme Court of the State of Connecticut.

PETITIONER,

By Nicholas P. Cardwell
NICHOLAS P. CARDWELL
108 Oak Street
Hartford, Conn. 06106
ATTORNEY FOR PETITIONER

Personally appeared the undersigned, who being duly sworn, deposes and says:

1. He is a member of the Bar of the State of Connecticut, of the Bar of the State of Maine, and of the Bar of the United States Supreme Court.

2. On the 8th. day of May, 1975, he deposited three (3) copies of this pleading together with the attached appendix in a United States Post Office mail box with the appropriate first class postage affixed thereto addressed to John D. LaBelle, Esq., State's Attorney for Hartford County, 95 Washington Street, Hartford, Connecticut 06106.

Nicholas P. Cardwell
NICHOLAS P. CARDWELL

Subscribed and sworn
to before me this
8TH. day of May, 1975.

Matthew J. Bruscia
Notary Public
My commissioner expires
date: 4/1/78

APPENDIX

CONNECTICUT LAW JOURNAL

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SUPREME COURT

December Term, 1974

STATE OF CONNECTICUT v. THOMAS P. LALLY

Indictment charging the defendant with the crime of murder in the first degree, brought to the Superior Court in Hartford County and tried to the jury before Shea, David M., J.; verdict and judgment of guilty of murder in the second degree and appeal by the defendant. No error.

Nicholas P. Cardwell, for the appellant (defendant).

Arnold M. Schwolsky, assistant state's attorney, with whom, on the brief, was John D. LaBelle, state's attorney, for the appellee (plaintiff).

HOUSE, C.J. The defendant was found guilty by a jury of the crime of murder in the second degree and appealed from the judgment rendered on the verdict. He assigned as error and has briefed three evidential rulings of the court admitting into evidence the in-court identification of the defendant, rulings permitting a witness to qualify as an expert in fingerprint identification and to testify as to his opinion, and a claim that the evidence offered by the state was insufficient to support the verdict.

A brief review of the evidence will serve to place the other claims of error in perspective before we consider them in detail; so, we first consider the defendant's contention that

the state's evidence was not sufficient to support the jury's verdict. Such a claim is tested by the evidence printed in the appendices to the briefs. State v. Saia, Conn. (36 Conn. L.J., No. 19, p.1); State v. Johnson, Conn. (35 Conn. L.J., No. 49, p.1).

On January 26, 1970, Ross Thomas, a clinical psychologist, occupied a two-room apartment which he used as an office-dwelling at 442 Farmington Avenue in Hartford. At about 9:45 p.m. on that date, Joseph N. Tobin, Jr., a director of special services at the Institute of Living in Hartford, visited Thomas. While he was there, Thomas received a telephone call from a person who wished to see him. At about 1:15 a.m., a person, identified in court by Tobin as the defendant, arrived. Tobin remained with the two men in the well-lighted room for about fifteen minutes and then left. The defendant was wearing an outer coat of brownish material which he kept on while he was in the apartment. At about 5:40 a.m., Officer Walter S. Parker of the Hartford police department saw the defendant at the Quartet Restaurant on Farmington Avenue. He had previously seen him at a gasoline station about two blocks west of 442 Farmington Avenue. While at the restaurant, Officer Parker received information about a possible crime and went to the Thomas apartment at 442 Farmington Avenue where he discovered the body of Thomas, who had been twice shot through the head by .32-caliber bullets fired at close range. George A. Kendall, Jr., worked at a gasoline station on Park Street, and, about 3 a.m. on January 27, the defendant came to the station and stayed for about one-half hour before leaving by taxi. Kendall noticed that the defendant's trench coat was spotted with blood. William F. Best was a taxi driver. He answered a call to Kendall's gasoline station on the morning of January 27 and transported the defendant to the Quartet Restaurant on Farmington Avenue. Another taxi driver, Irving S. Caplan, at about 6 a.m., answered a call and transported the defendant from the Quartet Restaurant to the Hilton Hotel in Hartford. At

the hotel, the defendant was stopped at the registration desk by three police officers. There was a spattering of blood on his trench coat. He was searched and a revolver was removed from his pocket. When taken, the revolver contained two spent shells. The defendant was arrested for carrying a pistol without a permit.

The Thomas apartment was inspected by the police and tests were made for latent fingerprints. One was found on an ashtray and was identified by Detective Michael Amaruso as made by the defendant. An autopsy disclosed that the death of Thomas was caused by bullet wounds to the head. The bullets were recovered and turned over to Walter E. Perkins, director of the Hartford crime laboratory, who conducted ballistics tests and testified that in his opinion the bullets recovered from Thomas' body had been fired from the revolver which had been taken from the possession of the defendant at the Hilton Hotel. Several doctors testified as to their findings and opinions with respect to the defendant's mental condition, including Louis Gold, a psychiatrist, who testified that Lally did not lack the capacity to understand the wrongfulness of his behavior or to conform his behavior to the requirements of the law.

This is but a brief summary of the evidence which the jury had for consideration, but it suffices to show that there was no merit to the defendant's motion to set aside the verdict on the ground that it was against the evidence, and that the court committed no error in denying the motion.

The defendant's first several assignments of error are addressed to rulings of the court which permitted witnesses Tobin, Kendall, Best and Caplan to make an in-court identification of the defendant and to describe their respective contacts with him on the night of the homicide. The rulings were all made by the court in a preliminary hearing in the absence of the jury on the defendant's motion to suppress the in-

court identification. The defendant did not brief the assignment of error addressed to Caplan's testimony and identification so it is considered to have been abandoned. State v. Croom, Conn. (35 Conn. L.J., No. 39, pp. 14, 16); State v. Brown, 163 Conn. 52, 55, 301 A.2d 547. While the testimony of each of the other three witnesses related to the particular circumstances of his contact with the defendant, each of them, at the trial, identified the defendant as the person with whom he had contact on the early morning of January 27, 1970, and testified as to the circumstances of that contact and as to the opportunity each had to observe him. In each instance the court concluded from the testimony at the preliminary hearing that each witness' in-court identification of the defendant was based upon his recollection of his contact with the defendant on the early morning in question.

The defendant claims that the court should not have permitted the in-court identification by the three witnesses because each of them had previously identified the defendant to the police from photographs shown to each of them by the police in the absence of the defendant and his counsel. The finding of the court discloses that on the morning of the homicide each of the three witnesses went to the police station and each, separately, was shown several photographs, including one of the defendant, and each witness selected the photograph of the defendant as the man with whom he had had contact earlier in the morning - Tobin at Thomas' apartment, Kendall at the service station, and Best in conveying the defendant by taxi from the station to the restaurant.

It is the contention of the defendant, relying upon and quoting from the decision of the United States Supreme Court in Wade v. United States, 388 U.S. 218, 235, 87 S.Ct. 1926, 18 L. Ed. 2d 1149, that, since he was already under arrest, this pre-trial identification by photograph for the police in the absence of the

defendant and counsel for him violated his constitutional rights and rendered inadmissible the courtroom identification as "the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial" because "the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him."

The defendant lays much stress on the fact that all of the photographs submitted to the identification witnesses by the police were not preserved and were not made available for examination in court. He contends that the photographs used in a pretrial identification procedure must be introduced as part of the state's case in order to satisfy the burden of clear and convincing proof that the in-court identification was not "tainted," and that if the state fails to introduce them, then, as a matter of law, the trial court should rule inadmissible any in-court identification testimony by a witness. Obviously the retention and preservation for examination at trial of the photographs used at a pretrial identification is a highly desirable practice and, depending upon the circumstances, may greatly aid the prosecution in sustaining its burden of proof or, on the other hand, mitigate the dangers of misidentification due to the suggestiveness of the photographs themselves. Although the practice is highly desirable, it cannot be held, as a matter of law, to be a necessary condition precedent to a permissible in-court identification.

The short answer to the defendant's contention lies in the finding of the court as stated in its ruling: "I conclude that each of the witnesses had an independent basis for making the identification apart from anything which occurred at the police station, and I am not aware of anything which occurred at the police station which was in any way unduly suggestive. Therefore, the conclusion of the Court is that each of them had an independent basis to make

the in-court identification, and the objection is overruled in that respect." The court's unattacked finding of fact as to the identification by photograph procedure at the police station fully supports its conclusion. The procedure followed and the ruling of the court were fully in accord with the holdings of this court in State v. Duffen, 160 Conn. 77, 273 A.2d 863, cert. denied, 402 U.S. 914, 91 S. Ct. 1397, 28 L.Ed. 2d 657, and State v. Oliver, 161 Conn. 348, 288 A.2d 81.

In the Oliver case, we observed (p. 358): "We also note the absence at the present time of any definitive ruling from the United States Supreme Court on the question whether the holding of the Wade case is applicable to pretrial identification of a suspect by the use of photographs without the presence of the suspect's counsel." That definitive ruling has now been made in the case of United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619. In the present case, Lally had been arrested but a few hours before for carrying a pistol without a permit. He was in custody but had not as yet been informed against. The photographic identification process was still part of the police investigative procedure. In the Ash case, Ash had already been indicted. It was during the prosecutor's preparation for trial that he used a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. It was the post-indictment identification upon which Ash based his claim that he was denied the right to counsel at a "critical stage" of the prosecution. Nevertheless, the Supreme Court did not extend the scope of the Wade decision and concluded (p. 321): "We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required. We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the

offender." In the light of our prior cases and the holding in United States v. Ash, supra, there was clearly no error in the rulings of the court relating to the witnesses' identification of the defendant.

The defendant has also assigned as error the ruling of the court that Michael Amaruso qualified as an expert witness on the subject of fingerprints and could testify to his discovery of a fingerprint at Thomas' apartment which he concluded had been made by the defendant. Before making the ruling, the court heard testimony as to the witness' years of service in the police department, in the identification division, the training he received in the field of fingerprinting from an experienced expert, his course of study conducted by the federal bureau of investigation, his professional membership, and further studies." "The determination of the qualification of an expert is largely a matter for the discretion of the trial court." Coffin v. Laskau, 89 Conn. 325, 329, 94 A. 370; Oborski v. New Haven Gas Co., 151 Conn. 274, 280, 197 A.2d 73. The trial court's decision is not to be disturbed on appeal "unless that discretion has been abused, or the error is clear and involves a misconception of the law." 31 Am. Jur. 2d 531, Expert and Opinion Evidence, §31.' Siladi v. McNamara,...[164 Conn. 510, 513. 325 A.2d 277]." Nash v. Hunt, Conn. (35 Conn. L.J., No. 49, pp. 7, 9). We also find no abuse of discretion in this ruling of the court.

There is no error.

In this opinion the other judges concurred.